IN THE SUPREME COURT OF THE STATE OF NEVADA

ROMAN HILDT,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE RICHARD F. SCOTTI, DISTRICT COURT JUDGE
Respondents,
and
CITY OF HENDERSON,
Real Parties in Interest.

Case No. 79605

BRIEF OF AMICUS CURIAE OF THE CLARK COUNTY DISTRICT ATTORNEY IN SUPPORT OF REAL PARTY IN INTEREST

ADAM L. GILL, ESQ.
Nevada Bar #011575
MICHAEL AISEN, ESQ.
Nevada Bar #011036
723 South Third Street
Las Vegas, Nevada 89101
(702) 750-1590

Counsel for Petitioner

MARC M. SCHIFALACQUA
Sr. Assistant City Attorney
Nevada Bar #010435
ELAINE F. MATHER
Assistant City Attorney
Nevada Bar #010399
243 S. Water Street, MSC 711
Henderson, Nevada 89015
(702) 267-1370

Counsel for Real Party in Interest

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

Counsel for Amicus Curiae

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

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INTRODUCTION

The Clark County District Attorney's Office is filing this amicus curiae brief pursuant to NRAP 29(a) and has an interest in this case because it prosecutes Nevada's misdemeanor battery domestic violence cases as well as Nevada's felony cases enhanced by misdemeanor battery domestic violence convictions.

In the instant case, Roman Hildt ("Petitioner") requests this Court to retroactively apply its holding in Andersen v. Eighth Judicial District Court to vacate his misdemeanor battery constituting domestic violence conviction. 135 Nev. Adv. Op. 42, 448 P.3d 1120, 1122 (2019); Petitioner's Opening Brief ("AOB") at 2. Specifically, he argues that the Henderson Municipal Court erred when it did not grant him a jury trial pursuant to Andersen. AOB at 2. While the City of Henderson

("Real Party in Interest") has presented legal argument as to why Andersen should not be applied retroactively to Petitioner's, the Clark County District Attorney's Office has filed the instant amicus curiae brief to shed light on the potential state-wide consequences of retroactive application.

ARGUMENT

Recently, this Court overturned precedent and concluded that the 2015 NRS 202.360 legislative amendment elevated the charge of misdemeanor first-offense domestic battery to a serious offense thereby attaching the Sixth Amendment right to a jury trial for individuals charged with such offense.[1] Andersen v. Eighth Judicial Dist. Court in & for Cty. of Clark, 135 Nev. Adv. Op. 42, 448 P.3d 1120, 1124 (2019), *overruling* Amezcua v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 130 Nev. 45, 46, 319 P.3d 602, 603 (2014). The Court reasoned that the legislature's added penalty, the prohibition of the right to bear arms, is so "severe" as to make first-offense misdemeanor domestic battery a serious offense. Andersen, 135 Nev. Adv. Op. 42, 448 P.3d at 1124. Thus, it concluded that individuals charged

[1] NRS 202.360 Ownership or possession of firearm by certain persons prohibited; penalties.

1. A person shall not own or have in his or her possession or under his or her custody or control any firearm if the person:
   (a) Has been convicted in this State or any other state of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33);

with such offense have the right to a jury trial. Id. However, the retroactivity of this holding was not discussed.

There is both policy and legal support for not applying Andersen retroactively. First, and most importantly, permitting retroactive application would not only negatively affect past and current victims of misdemeanor domestic violence, but also such application would violate the legislative purpose for the statute. Second, rightfully concluding that Andersen presents a new rule that should only be applied prospectively would provide consistent treatment of the Court's holding among the Nevada Courts.

I. RETROACTIVE APPLICATION OF ANDERSEN WOULD HAVE A NEGATIVE IMPACT FOR VICTIMS OF DOMESTIC VIOLENCE

In the most recent statistics, Nevada ranked fourth in the U.S. for female victims murdered by males in a single victim or single offender incident. Violence Policy Center, *When Men Murder Women: An Analysis of 2017 Homicide Data*, http://vpc.org/studies/wmmw2019.pdf (Sept. 2019). According to a 2017 Nevada Coalition to End Domestic and Sexual Violence (NCEDSV) annual report, there were 47,368 reported domestic violence incidents in Nevada that year alone. NCEDSV, *2017 Calendar Year Statistics Report*, https://www.ncedsv.org/resources/statistics-and-reports/ (2017). As this Court knows, such a high number of domestic violence incidents is not a new phenomena.

Dating as far back as 1997, Nevada has consistently ranked in the top ten or top fifteen states for female victims murdered by males in a single victim or single offender incident. Violence Policy Center, *When Men Murder Women: An Analysis of 2017 Homicide Data*, http://vpc.org/revealing-the-impacts-of-gun-violence/female-homicide-victimization-by-males/. This crisis appeared to be on the Nevada Legislature's mind in 2015.

While introducing the 2015 amendment to NRS 202.360, Nevada State Senator James A. Settelmeyer clearly stated its purpose: "to keep guns out of the hands of those who have proven their propensity to commit violence against those they supposedly love and should protect." Senate Committee on the Judiciary Hearing Minutes, S.B. 175, 78th Sess. (Feb. 25, 2015). Indeed, Senator Settelmeyer hoped that with the added prohibition of firearm possession and ownership the bill would "help[] to protect victims of domestic violence." Id. Unwinding prior convictions of domestic violence would negatively increase the already troubling domestic violence statistics in the state of Nevada. It is likely that such unwinding would cause more harm than protection and would thus violate the sole legislative purpose of the amendment.

In the event individual convictions are vacated and subsequent jury trials are permitted, victims of domestic violence will once again be forced to relive some of the worst moments of their lives. Not only will victims have to relive the violence,

but the victims will be operating at a severe disadvantage as they are forced to try and recount past details that they have tried to suppress.

Such a scenario is akin to the purpose behind the laches limit imposed on those seeking post-conviction relief. NRS 34.800 specifically creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…" Keeping in mind the consequences of delay this Court has stated that, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 260 679 P.2d 1268, 1269 (1984). The Court further recognized that there is a danger that "memories of the crime may diminish and become attenuated." Id.

Such rationale applies equally to unravelling misdemeanor domestic violence convictions. The danger of delay goes beyond victims losing their memories and evidence being lost. The delay, whether that be because of a lack of infrastructure for jury trials or just the elongation of a final decision, may also cause victims to be more likely to recant as a result of a revived state of fear regarding the outcome of a trial or unwillingness to testify at trial. See Donna Wills, Domestic Violence the

Case for Aggressive Prosecution, 7 UCLA Women's L.J. 173, 177 (1997) ("[f]aced with having to testify in court, domestic violence victims, especially battered women, routinely recant, minimize the abuse, or fail to appear").

Procedurally, retroactive application would result in a spill-over effect on other criminal convictions further impacting victims. Pursuant to NRS 200.485(1)(c) when an individual commits their third offense of domestic battery constituting domestic violence within seven years, they are guilty of a Category B Felony and receive higher penalties. If first-offense domestic battery convictions are retroactively invalidated for lack of a jury trial, what effect would that application have on an individual who has received a third battery domestic violence conviction? If the first-offense domestic battery conviction is vacated, would that no longer provide a basis for the third-offense domestic battery conviction? Likewise, the effect of retroactive application on a possession of a firearm by a prohibited person conviction is equally unknown. If first-offense misdemeanor battery convictions are vacated and the Court permits jury trials retroactively, would that also warrant a possession of a firearm by a prohibited person conviction to be vacated as well?

The fact that Nevada municipal courts are ill-equipped for jury trials further exacerbates the effect retroactive application would have on victims. Not only would such application likely result in a "chilling effect," but more importantly it violates the legislative purpose of NRS 202.360. Indeed, in order to bypass the municipal

and justice courts inability to hold jury trials, prosecuting agencies have already begun to charge individuals for other crimes such as simple battery or even in some cases defendants have pled to lesser charges. See e.g. Editorial: Las Vegas to Ignore State Law on Guns, Domestic Violence, Las Vegas Review Journal (Oct. 17, 2019); See also Miranda Willson, Las Vegas Approves Domestic Violence Charge that Doesn't Take Offenders' Guns, Las Vegas Sun (Oct. 16, 2019); See also Shea Johnson, Las Vegas, North Las Vegas, North Las Vegas Pass Domestic Violence Laws Without Gun Ban, Las Vegas Review Journal (Oct. 16, 2019); See also Blake Apgar, Henderson Passes Domestic Violence Law Without Gun Provision, Las Vegas Review Journal (Oct. 15, 2019).

The fact that some municipalities feel they have no choice but to abandon seeking convictions for domestic violence is a travesty. Forcing new trials that would now only be prosecuted as misdemeanors that fail to prohibit firearm possession or ownership would be the opposite of legislative intent. The situation will only be exacerbated if more trials are added to the courts' dockets.

II. ANDERSEN SHOULD NOT APPLY RETROACTIVELY

The Real Party in Interest has provided this Court with the applicable legal precedent governing retroactive application of new rules. The Clark County District Attorney's Office agrees that Andersen announced a new rule of criminal procedure that should not apply to Petitioner's case. However, such analysis also provides the

support for precluding state-wide retroactive application. With this in mind, the Clark County District Attorney's Office provides an additional case line analogous to the instant issue.

Nevada courts have witnessed a similar retroactivity scenario via the United States Supreme Court's decision in Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473 (2010), and subsequently Chaidez v. United States, 568 U.S. 342, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013). In the context of plea negotiations, the Padilla Court considered whether counsel was ineffective under Strickland for failing to inform her client of the immigration consequences, including the risks of deportation, associated with entering a given plea. Padilla, 559 U.S. at 366–375, 130 S. Ct. at 1482–87. The Court answered this affirmatively as it declared, when the immigration consequences are easily apparent "counsel must inform her client whether his plea carries a risk of deportation." Id. at 374, 130 S. Ct. at 1486. Following this decision, there was a split among the states as to whether this holding applied retroactively. Id. at 347, 130 S. Ct. at 1107.

In hopes of resolving this split, the Supreme Court clarified in Chaidez that because the Padilla holding constituted a new rule, it would not apply retroactively. Relying on Teague the Court discusses what makes a rule retroactive:

> *Teague* makes the retroactivity of our criminal procedure decisions turn on whether they are novel. When we announce a "new rule," a person whose conviction is already final may not benefit from the decision in a habeas

> or similar proceeding. Only when we apply a settled rule may a person avail herself of the decision on collateral review.
>
> A case announces a new rule, *Teague* explained, when it breaks new ground or imposes a new obligation on the government. To put it differently, we continued, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. And a holding is not so dictated, we later stated, unless it would have been apparent to all reasonable jurists.
>
> But that account has a flipside. *Teague* also made clear that a case does not announce a new rule, when it is merely an application of the principle that governed a prior decision to a different set of facts … Otherwise said, when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes.

Chaidez, 568 U.S. at 347, 133 S. Ct. at 1107 (internal citations omitted) (internal quotations omitted); see also Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989). Using these standards, the Court classified Padilla as a new rule because Padilla's holding that the failure to advise about a non-criminal consequence could violate the Sixth Amendment would not have been, and was not, apparent to all reasonable jurists prior to the Court's decision in Padilla. Chaidez, 568 U.S. at 354,133 S. Ct. at 1111.

The retroactivity of this Court's holding in Andersen is analogous to the Padilla and Chaidez cases. Just as in Padilla, Andersen introduced a new rule that would not have been apparent to reasonable jurists prior to its decision. This is

exemplified by the fact that no Nevada courts previously held jury trials for first-offense misdemeanor battery domestic violence charges. Further just as there was a split among the states as a result of the Padilla decision, there is likely to be a split among Nevada courts on whether to apply Andersen retroactively. Issuing a decision that Andersen does not apply retroactively is now ripe and will ensure consistent application of the law among the Nevada courts.

CONCLUSION

Applying Andersen retroactively, by allowing thousands of domestic violence convictions to be set aside allowing the cases to be reopened, would not only have a significant negative impact on Nevada's victims of domestic violence and violate the legislative purpose of NRS 202.360, but also it would violate legal precedent. Nevada has an interest in providing protection to its citizens, which applying Andersen retroactively would not supply.

Dated this 12th day of December, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 2,210 words and 10 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 12th day of December, 2019.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 12th day of December, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

ADAM L. GILL, ESQ.
MICHAEL N. AISEN, ESQ.
Counsel for Petitioner

MARC M. SCHIFALACQUA
ELAINE F. MATHER
Real Party in Interest

ALEXANDER CHEN
Chief Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

JUDGE RICHARD SCOTTI
Eighth Judicial District Court, Dept. 2
Regional Justice Center, 3rd Floor
200 Lewis Ave.
Las Vegas, Nevada 89101

/s/ J. Garcia
Employee, Clark County
District Attorney's Office

AC/Brittni Griffith/jg